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August 4, 2005

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Re: Request for Waiver  
MB Docket No. 03-15  
WBNX-TV, Akron, Ohio, Facility ID No. 72958

Dear Secretary Dortch:

Winston Broadcasting Network, Inc., ("WBN"), by its attorneys, submits this request for waiver of the Commission's August 4, 2005 deadline (the "Checklist Deadline") for broadcasters with pending applications for digital television permits to construct the facilities they were allotted in the 1998 DTV Table of Allotments, also known as "checklist" facilities,<sup>1</sup> in response to the Public Notice released June 15, 2005.<sup>2</sup> WBN respectfully requests a six-month waiver of the Checklist Deadline, because it is unable to comply with the deadline waiver due to circumstances unique to the DTV conversion process.

WBN is the licensee of analog television station WBNX-TV, Channel 55, Akron, Ohio, Facility ID 72958, and has pending before the Commission an application for a digital facilities construction permit to operate on Channel 30. See BPCDT-19991029AFM (the "Application").

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<sup>1</sup> See *Second DTV Periodic Review Report and Order*, 19 FCC Rcd 18,279, para. 111 (2004) ("2<sup>nd</sup> Periodic R&O").

<sup>2</sup> See *DTV Channel Election Issues - Compliance with the July 1, 2005 Replication/Maximization Interference Protection Deadline; Stations Seeking Extension of the Deadline*, Public Notice, DA 05-1636 (2005) ("DTV Construction Notice").

The Application remains pending as the proposed facilities purportedly fail to adequately protect Canadian digital television station Channel 30, Paris, Ontario in contravention of the *Letter of Understanding between the Commission and Industry Canada* (released September 29, 2000) (the "Canadian LOU").<sup>3</sup> As demonstrated below, WBN believes that Industry Canada has approved the Application, so there is no reason the FCC should not grant the Application and allow WBN to construct its proposed DTV facilities, as opposed to the inferior checklist facilities.

WBN responded to the December 18<sup>th</sup> Letter by amending the Application on February 19, 2004 to propose that the antenna originally proposed in the Application be replaced with a new Dielectric custom directional transmitting antenna that would eliminate the prohibited interference with the Canadian DTV station using electric and mechanical beam tilting. The Application remained pending despite WBN filing the February 19, 2004 amendment.

As a result, WBN sent a letter to the Commission on April 9, 2004 that followed up on the February 19, 2004 amendment.<sup>4</sup> In the April 9<sup>th</sup> Letter, WBN stated that it was informed that the Application was no longer being processed because it was alleged that Industry Canada did not recognize beam tilting as a mechanism to eliminate signal interference in the DTV context, even though beam tilting was specifically included in the Canadian LOU as a technical factor that could be used to determine if a proposed U.S. television station would cause interference to a Canadian television station. *See* Canadian LOU, para.5. WBN requested that the Commission grant the Application given the fact that the Application complies with both the Commission's Rules and the Canadian LOU.

It is critical to note that Industry Canada officials directly contacted WBN's consulting engineer, John E. Hidle, to discuss the beam tilting that the Application proposed, and after a few telephone conversations, the officials told Mr. Hidle that they agreed that the beam tilting proposal complied with the LOU. It was Mr. Hidle's understanding that Industry Canada was going to approve the Application and notify the FCC. Furthermore, in March and April 2005, WBN consulting engineer Dirk Freeman spoke directly with Martin Dumas at Industry Canada who specifically stated to Mr. Freeman that Industry Canada agrees that WBN's proposed use of beam tilting complies with the LOU and Canadian regulations. Mr. Dumas told Mr. Freeman that differences in computer systems required Industry Canada to manually input WBN's Application information in the agency's computer system, and that would take about a month. Mr. Dumas indicated to Mr. Freeman that he would instruct Industry Canada official George Hopkins, who had earlier spoken with WBN consulting engineer John E. Hidle, to manually update Industry Canada's computer system with WBNX-DT's Application data. Mr. Dumas further assured Mr. Freeman that Industry Canada would notify the FCC that Industry Canada approves of the Application. Since the Application has not yet been granted, WBN and its

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<sup>3</sup> *See Letter* from Clay Pendarvis, Associate Chief, Video Division, Media Bureau, FCC to WBN dated December 18, 2003 (the "December 18<sup>th</sup> Letter").

<sup>4</sup> *See Letter* from Kevin M. Walsh, Irwin, Campbell & Tannenwald, P.C., to Marlene H. Dortch, Secretary, FCC dated April 9, 2004 (the "April 9<sup>th</sup> Letter").

consulting engineers are working to determine if Industry Canada ever told the FCC that it approved the Application.

The Commission has stated that applicants can seek waivers of the Checklist Deadline on the same basis as licensees and permittees sought waivers of the DTV construction deadlines.<sup>5</sup> As with all waiver requests, applicants must show that there is good cause to grant the waiver and that the waiver will serve the public interest.<sup>6</sup> Additionally, the Commission set forth certain factors for which applicants could seek construction deadline waivers. In the *Fifth Report & Order*, the Commission stated that it would take into account problems encountered by applicants that are unique to the DTV conversion that could justify a waiver of the Commission's rules.<sup>7</sup>

WBN believes that the delay in obtaining Industry Canada's formal approval of WBN's proposal to utilize beam tilting in the Application in order to eliminate impermissible interference to a Canadian DTV station is a problem that is unique to the DTV conversion process and justifies the instant waiver request. Good cause is shown for the request in that the use of beam tilting as proposed in WBN's Application appears to be rather rare, as evidenced by Industry Canada officials directly contacting Mr. Hidle so he could explain it to them and Mr. Hidle's many conversations with the Commission staff to explain his proposed use of beam tilting and the subsequent delays in processing the Application this has caused. A grant of the request will be in the public interest as WBNX-DT can finally be constructed and begin providing digital broadcasting to its community and other DTV applicants that employ beam tilting would not have to encounter the same delays that WBN faced.

As the Commission indicated in the Order, stations with pending DTV CP applications may continue to pursue their non-checklist facilities while complying with the "Checklist Deadline" or presumably seeking a waiver of the deadline.<sup>8</sup> WBN intends to continue to pursue a grant of the Application, as it believes that the application is in complete compliance with the Commission's rules and the Canadian LOU.

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<sup>5</sup> See DTV Construction Notice.

<sup>6</sup> See *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972).


<sup>7</sup> *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, FCC 97-116, MM Docket No. 87-268, 12 FCC Rcd at 12809, para. 77 (1997).

<sup>8</sup> 2<sup>nd</sup> Periodic R&O, para. 113.

Marlene H. Dortch, Secretary  
August 4, 2005  
Page 4

For the reasons set forth above, WBN respectfully requests a waiver of the Checklist Deadline. WBN will construct the facilities as set out in the Application upon grant of the Application.

Respectfully requested,



Kevin M. Walsh  
Nathaniel J. Hardy

## DECLARATION

I have reviewed the foregoing letter and declare that the information in the letter is true and correct to the best of my knowledge, information and belief.



Lou Spangler, President  
Winston Broadcasting Network, Inc.

Date: 8/3/05

**CERTIFICATE OF SERVICE**

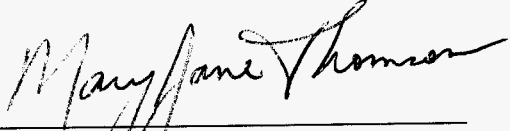
I, Mary Jane Thomson, hereby certify that a true copy of the foregoing letter was served by first class United States mail, postage prepaid, or by hand delivery on this 4<sup>th</sup> day of August, 2005 upon each of the following:

Shaun Maher, Esq.\*  
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Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room 2-A820  
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Clay Pendarvis, Associate Chief\*  
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Mary Jane Thomson

\* Denotes Delivery By Hand